Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NOS. 75-73, 75-109

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated, *Appellants in No. 75-73,*

JANE HUNDERWADEL, for herself and all others similarly situated, *Appellant in No. 75-109,*

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated, *Appellees in Nos. 75-73 and 75-109.*

MOTION TO AFFIRM AND BRIEF

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v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated, *Appellees in Nos. 75-73 and 75-109.*

MOTION TO AFFIRM

Appellees respectfully move this Court to affirm the judgment of the three-judge District Court upon the ground that the double parental consent requirement of

the Massachusetts abortion law, Mass. Gen. Laws, c. 112, § 12P, is unconstitutional and inconsistent with *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Respectfully submitted:

ROY LUCAS
Attorney for Appellees.

Of Counsel:

JOAN C. SCHMIDT

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BRIEF IN SUPPORT OF MOTION TO AFFIRM

Appellees respectfully submit this brief in support of the motion to affirm.

CITATION TO OPINION BELOW

The opinion of the three-judge District Court has been officially reported as *Baird* v. *Bellotti,* 393 F. Supp. 847 (D. Mass. 1975).

QUESTIONS PRESENTED

I.

Whether the double parental consent provision of the Massachusetts abortion law, Mass. Gen. Laws, c. 112, § 12P, invades a pregnant minor woman's individual Fourteenth Amendment right of privacy by permitting either parent, for any reason or no reason at all, to veto her access to necessary medical care, regardless of rape, incest, her medical needs, or personal maturity?

II.

Whether the parents of Mary Moe were necessary parties to this action where their interests were protected by the attorney general and a class of parent intervenor-defendants, and disclosure of Mary Moe's identity would have caused her irreparable injury?

III.

Whether a guardian ad litem should have been appointed, even though minor Mary Moe's interests were fully represented by existing parties with identical interests, where she was sufficiently mature to consent to representation of herself, and state law contained no requirement that a guardian be appointed in such a case?

IV.

Whether the District Court should have certified any issues to the Supreme Judicial Court of Massachusetts

when no determination of a state law question would have substantially modified the overriding issues of federal law?

STATEMENT OF THE CASE

This is a civil action under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 by a physician, a pregnant patient, an abortion center, and individuals associated therewith. Plaintiffs sought and obtained from the three-judge court permanent declaratory and injunctive relief. The double parental consent clause of the Massachusetts abortion law, Mass. Gen. Laws, c. 112, § 12P, was held to violate the right of privacy of minor women in light of *Roe* v. *Wade,* 410 U.S. 113 (1973), *In re Gault,* 387 U.S. 1 (1967), and numerous other authorities.

Three days of expert testimony and other evidence were presented to the three-judge court. A thorough opinion by Senior Circuit Judge Bailey Aldrich invalidated the statutory provision in question. A dissenting opinion was filed by Senior District Judge Julian, who had denied relief as well as bail and been reversed in the earlier case of *Baird* v. *Eisenstadt,* 310 F. Supp. 951 (D. Mass.), *rev'd,* 429 F.2d 1398 (1st Cir. 1970), *aff'd,* 405 U.S. 438 (1972).

The respective jurisdictional statements set out the facts with substantial accuracy. Several irrelevant and improper innuendos are made by Appellant-Intervenor in No. 75-109. These are denied. They have no bearing on the double parental consent issue, and will not be addressed.

ARGUMENT

The double parental consent provision of the Massachusetts abortion law, Mass. Gen. Laws, c.112, § 12P, invades a pregnant minor woman's individual Fourteenth Amendment right of privacy by permitting either parent, for any reason or no reason at all, to veto her access to necessary medical care, regardless of rape, incest, her medical needs, or personal maturity.

The constitutionality of various parental-consent-to-abortion laws has been raised in litigation across the United States from Florida [1] to Washington State [2] to Massachusetts.[3] Only one lower court has upheld a parental consent clause, and this Court has noted probable jurisdiction over an appeal from that judgment. *Planned Parenthood* v. *Danforth*, 392 F. Supp. 1362 (E.D. Mo.) (three-judge court), *stay granted pending appeal*, 420 U.S. 918, *prob. jurisd. noted*, U.S. (Oct. 7, 1975) (Nos. 74-1151 & 74-1419).

Relevant lower court controversies, numbering perhaps as many as forty cases, are pending on the privacy rights of minors from ages 15 to 18 regarding access not only to abortion but also to contraceptive information and family planning services.[4] The cases vary from alleged malpractice-battery based on a mature minor's abortion without parental consent [5] to

[1] *Coe* v. *Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1974) (three-judge court), *appeal dismissed*, 417 U.S. 279 (1974), *aff'd*, 517 F.2d 787 (5th Cir. 1975).

[2] *State* v. *Koome*, 84 Wash.2d 901, 530 P.2d 260 (1975).

[3] *Baird* v. *Bellotti*, *supra*, the instant case.

[4] *E.g.*, *Population Services Intn'l* v. *Wilson*, — F.Supp — (S.D.N.Y. July 2, 1975) (74 Civ. 1572), *appeal docketed*, 44 U.S.L.W. 3162 (U.S., Sept. 20, 1975) (No. 75-443).

[5] *E.g.*, *Bogart* v. *Vermont Women's Health Center, Inc.*, No. 412-75-CNC (Vt. Super. Ct., Chittenden Cnty, 1975).

attempted criminal prosecution of a physician for the abortion of a minor who misrepresented her age.[6]

The present appeal differs sufficiently from *Danforth* and presents the opportunity for such a broader perspective on the implications of any decision, that plenary review should be granted for argument in tandem with *Danforth*.

First, this appeal comes with a substantial evidentiary record of testimony from nationally prominent experts on adolescent sexuality and psychology.

Second, this appeal involves a statute requiring the consent of *both* parents to a minor's abortion, not one as in *Danforth*.

Third, separate consideration of this appeal apart from the many other issues in *Danforth* would enable the Court to focus more directly upon the very significant constitutional problems of conflicts among the competing interests of minor women, parents, family, and the State, which have never been fully examined. *Cf. Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *In re Gault*, 387 U.S. 1 (1967); *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

The parental consent issue is too important and has such potential for sweeping impact on other areas of medical care and parental relations that it should not be caught up in the many other issues presented by *Danforth*.

The unanimous weight of authority on parental consent to abortion suggests that such statutes are overbroad and inconsistent with the rationale of *Roe* v.

[6] *E.g.*, *Floyd* v. *Anders*, Civ. No. 75-1481 (D.S.C., 1975).

Wade, supra, and *In re Gault, supra.* See, *e.g., Poe* v *Gerstein,* 517 F.2d 787 (5th Cir. 1975), and cases cited therein. Any collateral issues in this appeal are dependent upon the primary parental consent question and its resolution.

The Court should note probable jurisdiction over this appeal and set the case for argument with Nos. 74-1151 and 74-1419, *Planned Parenthood* v. *Danforth, supra.*

Respectfully submitted,

ROY LUCAS
Attorney for Appellees.

Of Counsel:

JOAN C. SCHMIDT

CERTIFICATE OF SERVICE

This Motion to Affirm and Brief has been served on all counsel for Defendants and Defendant-Intervenor by First Class Mail this 24th day of October 1975.

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